Justin Ong Seng Beng & Ors v Ong Lee Hoon (No 3)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–801 OF 1996
KAMALANATHAN RATNAM J
28 JANUARY 2000

Civil Procedure *— Accounts — Action for — Misappropriation of trust fund — Application for interim payment out of trust fund — Failure to certify amount due on account, whether defence to resist application — Whether admission of sum owing to trust fund can be equated to a certification — Whether admission of sum due is sufficient for the grant of interim order — Rules of the High Court 1980 O 22 rr 3, 4 & (a)*

The plaintiffs' grandmother by a deed of settlement created a trust fund of which the plaintiffs were its beneficiaries. The defendant was appointed the trustee of the trust fund. The court had earlier ordered the defendant to produce the trustee account. It was found that in that very account itself that the defendant has admitted owing the trust fund the sum of S$1,138,425.56 as at 1 June 1998. It was also found that the defendant had pledged the trust fund against overdraft facilities which were later utilized in full to settle the overdraft facilities. Whilst pursuing for an order for the full sum admitted, the plaintiffs prayed for an alternative order that the defendant make an interim payment to them out of the trust fund.

Held, granting the application:

The plaintiffs' application was based on O 22A of the Rules of the High Court 1980 ('the RHC') where r 3 deals with the order for interim payment in respect of damages whereas r 4 deals with an order for interim payment in respect of sums other than damages. Since r 3 deals with damages, the present application clearly does not fall under r 3. However to qualify under r 4, there must be an actual amount which has been certified but in the present case, no amount has been certified as such. The question was whether the defendant could avail herself to this defence. The inequitable conduct of delay and refusal to produce the proper set of accounts on the part of the defendant must certainly negate the availability of any such defence as a party in default cannot shield herself from a legitimate claim by raising her own inequity as a defence. Also a mere wrongful submission of the law by the plaintiffs' counsel who brought the application under r 3 instead of the proper r 4 should not deprive the plaintiffs of a valid claim when such was clearly seen to exist as in this case. Futhermore, the admission of the defendant could be equated to a certification as is required under r 4(a). Finally the very fact that the defendant had admitted to the sum was sufficient for the grant of an interim order under O 22 r 4 of the RHC (see pp 451C–D, 452H–453B).

A [**Bahasa Malaysia summary**

Nenek plaintif-plaintif telah melalui satu suratikatan penyelesaian mewujudkan satu tabung amanah di mana plaintif-plaintif adalah benefisiarinya. Defendan telah dilantik sebagai pemegang amanah kepada tabung amanah tersebut. Mahkamah sebelum itu telah B memerintahkan defendan untuk mengemukakan akaun pemegang amanah. Adalah didapati bahawa di dalam akuan tersebut defendan telah membuat pengakuan berhutang kepada tabung amanah sejumlah S$1,138,425.56 setakat 1 Jun 1998. Adalah juga didapati bahawa defendan telah menyandarkan tabung amanah tersebut terhadap kemudahan overdraf yang kemudiannya telah digunakan C sepenuhnya untuk menyelesaikan kemudahan overdraf tersebut. Sementara melaksanakan satu perintah untuk jumlah penuh dimasukkan, plaintif-plaintif memohon satu perintah alternatif agar defendan membuat bayaran interim kepada mereka daripada tabung amanah tersebut.

D **Diputuskan**, membenarkan permohonan tersebut:

Permohonan plaintif-plaintif adalah berdasarkan A 22A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') di mana k 3 berkaitan dengan perintah untuk bayaran interim berhubung dengan ganti rugi sementara k 4 berkaitan dengan satu perintah bayaran interim E berhubung dengan jumlah selain daripada ganti rugi. Memandangkan k 3 berkaitan dengan ganti rugi, permohonan yang sekarang ini dengan jelas tidak termasuk di bawah k 3. Namun begitu, untuk layak di bawah k 4, perlu wujud satu jumlah sebenar yang telah disahkan tetapi di dalam kes ini, tiada jumlah yang telah disahkan sedemikian. Persoalannya adalah sama ada defendan boleh menyelamatkan diri F beliau dengan pembelaan ini. Perlakuan melambat-lambatkan dan keengganan mengemukakan set akaun-akaun yang betul yang tidak adil di pihak defendan sememangnya perlu menyangkal akan terdapatnya apa-apa pembelaan sedemikian kerana satu pihak tidak boleh melindungi diri beliau daripada satu tuntutan yang sah dengan G menimbulkan ketidakadilan beliau sendiri sebagai satu pembelaan. Satu penghujahan yang salah di sisi undang-undang oleh peguam plaintif-plaintif yang membawa permohonan tersebut di bawah k 3 dan bukan k 4 juga tidak sepatutnya menidakkan satu tuntutan yang sah plaintif-plaintif apabila ia wujud dengan amat jelas di dalam kes ini. Tambahan pula, pengakuan defendan boleh disamakan dengan H satu pengesahan sebagai mana yang dikehendaki di bawah k 4(a). Akhirnya hakikat bahawa defendan telah mengakui jumlah tersebut adalah mencukupi untuk membenarkan satu perintah interim di bawah A 22 k 4 KMT (lihat ms 451C–D, 452H–453B).]

I **Notes**

For cases on action for accounts, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 12–14.

Legislation referred to

Rules of the High Court 1980 O 22A r 3(1)(a), O 22A 3(1)(b), O 22A r 4(a)

David Mathews (*Suraya Hussain*) (*Abdul Aziz, Ong & Co*) for the plaintiffs.

Azlan Sulaiman (*Ghazi & Lim*) for the defendant.

Kamalanathan Ratnam J:

The application

This is an application by the plaintiffs for an order that:

(a) the defendant make an interim payment to the first plaintiff to hold as trustee for himself and thesecond plaintiff the sum of Singapore Dollars One Million One Hundred and Thirty Eight Thousand and Four Hundred and Twenty Five and Cents Fifty Six Only, SD1,138,425.56 (the said sum) being the sum admitted by the defendant as owing as at 1 June 1998 to the trust fund established by Madam Chin Chooi Choo on 24 July 1980 through an instrument of settlement (the settlement) and to the first and second plaintiffs as the beneficiaries of the settlement within fourteen (14) days from date of this order together with interest thereon to be calculated at the rate of 8% per annum from 1 June 1998 to date of full payment;

(b) the first plaintiff as trustee over the said sum be vested with all rights and powers of trustee under the settlement with full liberty to apply the said sum or any part thereof in accordance with the provision of the settlement for the benefit of the first and/or the second plaintiff herein.

(c) the payment of the said sum shall be without prejudice to the rights of the first and second plaintiffs herein to recover all assets, monies and properties rightfully due and owing to the trust fund under the settlement and the first and second plaintiffs herein as the beneficiaries thereof; and

(d) costs.

Facts

The grandmother of the first and second plaintiffs, Chin Chooi Choo, by a deed of settlement dated 24 July 1980, created a trust fund for the benefit of the first and second plaintiffs. The trust fund was established with a sum of GBP135,000 which was from time to time, together with the accumulated interest, converted into various other currencies and deposited in various banks in Asian Currency Unit Deposits (the trust fund). The defendant was appointed the trustee of the said trust fund.

On 31 January 1997, this court granted the plaintiffs the following orders:

A (1) that the defendant, as a trustee under the settlement deed dated 24 July 1980 and created by Chin Chooi Choo (F) (NRIC No 0114680), do produce the accounts on the sum of GBP135,000 together with interest and/or profits accruing thereto.

(2) that the defendant whether by herself, her servants or agents or B anyone howsoever, be restrained from disposing of and/or using the said sum of GBP135,000 together with the interest and/or profits therein unlawfully, or by not complying with the rules of the Trustee Act 1949 and other relevant laws or rules and/or by not complying with the terms and conditions of the said settlement document.

C

On 26 June 1998, the plaintiffs obtained an order for interim payment (the interim order) out of the trust fund, for educational expenses, the sums amounting to GBP10,000 and GBP9,051.79 for the first and second plaintiffs respectively.

D On 4 September 1998, this court dismissed the defendant's application to adduce fresh accounts. This court also directed that the defendant do furnish the accounts and that the same was to be verified by an affidavit and lodged in accordance with the practice adopted in Atkin's Court Forms.

E

Findings of the court

After many requests for adjournments the defendant finally produced what she called a trustee account prepared by Rabin & Co, a firm of accountants. I find as a fact that in that very account itself the defendant has admitted F owing the trust fund the sum of S$1,138,425.56 as at 1 June 1998. I had also in my earlier written judgment dated 4 September 1998 found that the defendant had pledged the said trust fund against overdraft facilities which were later utilised in full to settle the said overdraft facilities.

On 15 April 1999, this court granted the plaintiffs an order for a Mareva G injunction and for interrogatories. Whilst the plaintiffs have not accepted the trustee account produced by the defendant as correct and had challenged and disputed the same, I accept the plaintiffs' without prejudice submission that the admissions of the defendant that she owed the trust fund the sum of S$1,138,425.56 ought to be held against the defendant. In challenging the truth of the trustee account the plaintiffs H sought leave to cross examine the defendant and although the cross-examination was fixed for 30 March 1999 I had adjourned the same pending the defendant's disclosure of all monies and assets pursuant to my order dated 15 April 1999. Clearly therefore this application of the plaintiffs is based on the defendant's admission of owing the trust fund the sum of I S$1,138,425.56.

By a supplementary affidavit the plaintiffs have itemised their specific requirements which are reproduced herewith:

(a) The first plaintiff

Particulars	Amount
(i) School Fees (Marlborough College)	
(1990-1992) (1992-1995)	GBP43,938.84 — loan repayment
(ii) University Fees (Durham University)	
(1996/1997)	GBP6,398 — loan repayment
(1997/1998)	GBP6,622 — loan repayment
(1998/1999)	GBP6,600 — loan repayment
(iii) Legal Practitioner's Course Fees	GBP6,400 — payable
(iv) Membership fees for Law Society	GBP205 — payable
(v) Food, lodging transportation (GBP1,500 per month x 12 months)	GBP18,000 — payable
(vi) Books and stationeries	GBP500 — payable
Less sum paid by defendant	(GBP10,000)
TOTAL SUM REQUIRED	GBP78,663.84

(b)The second plaintiff

Particulars	Amount
(i) School fees (1994-1998) Total: GBP101,888.04 Less GBP9,051.79 already paid by the defendant	GBP92,836.25 — loan repayment
(ii) University fees (London School of Economics (LSE)) (1998-1999) Total: GBP8,764 partially paid in 2 instalments.	
Balance to be paid: GBP2,938	GBP5,826 — loan repayment GBP2,938 — payable
(1999-2000)	GBP8,764 — payable
(2000-2001)	GBP8,764 — payable

(iii) Hostel fee (1998-1999)	GBP2,257.96 — loan repayment
(iv) Food, lodging and transportation (GBP 1,000 x 24 months) (1999-2001)	GBP24,000 — payable
TOTAL SUM REQUIRED	GBP145,386.21

Whilst initially arguing for an order for the full sum admitted, the plaintiffs prayed for an alternative order for payment of the total sum of GBP224,050.05 being the sum total of both the plaintiffs' requirements. It was conceded by the plaintiffs that this total sum now sought has in fact taken into consideration the amounts already paid by the defendant pursuant to a previous order of this court.

Encik Azlan for the defendant on the other hand argued that the plaintiffs were not at this stage entitled to any interim payment. Whilst the plaintiffs have pleaded that the said application was based on O 22A of the Rules of the High Court 1980 ('the RHC'), the plaintiffs did not specify if the said application was made pursuant to r 3 or r 4 because r 3 deals with the order for interim payment in respect of damages whereas r 4 deals with an order for interim payment in respect of sums other than damages. It was the contention of En Azlan that this application ought to have been made pursuant to r 4 because this matter related to other claims and not to damages. It is therefore necessary to reproduce both the relevant rules:

O 22A r 3

3 Order for interim payment in respect of damages

(1) If, on the hearing of an application under rule 2 in an action for damages, the court is satisfied —

(a) that the defendant against whom the order is sought (in this paragraph referred to as 'the respondent') has admitted liability for the plaintiffs' damages; or

(b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or

(c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,

the court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.

(2) oorder shall be made under paragraph (1) in an action for personal injuries if it appears to the court that the defendant is not a person falling within one of the following categories, namely —

(a) a person who is insured in respect of the plaintiff's claim;

(b) a public authority; or

(c) a person whose means and resources are such as to enable him to make the interim payment.

O 22A r 4

4 Order for interim payment in respect of sums other than damages

If, on the hearing of an application under rule 10, the court is satisfied —

(a) that the plaintiff has obtained an order for an account to be taken as between himself and the defendant and for any amount certified due on taking the account to be paid; or

(b) that the plaintiff's action includes a claim for possession of land and, if the action proceeded to trial, the defendant would be held liable to pay to the plaintiff a sum of money in respect of the defendant's use and occupation of the land during the pendency of the action, even if a final judgment or order were given or made in favour of the defendant; or

(c) that, if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs,

the court may, if it thinks fit, and without prejudice to any contention of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.

Mr Mathews informed the court that he was in fact relying on r 3(1)(a) and (c) based on the defendant's admission. He conceded that he cannot proceed under r 4 because to date no amount has actually been certified. In the course of submission the defendant argued that she was not a trustee. I then referred En Azlan to various references to the defendant as trustee, in the affidavits and exhibits. It is not now in dispute that the defendant is no longer the trustee of the said trust fund and as such there is no lawful basis for the defendant to retain at least, all the monies due under the trust fund.

The question that arises is does the present case fall under r 3 as proposed by the plaintiffs. It is my considered judgment that this application cannot be considered under r 3 which deals with damages and certainly that is not the case here. Clearly this application must fall under r 4 which deals with matters other than damages and certainly a claim made under a trust account must fall under r 4. If that be the case, then the defendant prays that no order be made because no amount has been certified pursuant to r 4(a).

But then ought this court allow the defendant to raise this defence? Can the defendant raise her own delay and refusal to produce the proper set of accounts as a defence to the plaintiffs' legitimate claim based on the defendant's own admission? The inequitable conduct of the defendant must certainly negate any such defence. A party in default cannot shield herself from a legitimate claim by raising her own inequity as a defence. Whilst the proper application ought to be under r 4 and not r 3 as contended by the

plaintiffs' counsel, a mere wrongful submission of the law by counsel should not deprive the plaintiffs of a valid claim when such is clearly seen to exist as in this case. Further, the admission of the defendant can be equated to a certification as is required under r 4(a). Whilst an order for an account has yet to be taken because the cross-examination of the defendant by the plaintiffs challenging the truth of the defendant's trustee account has yet to be completed, the very fact that the defendant has admitted to the sum is sufficient for me to grant an interim order under O 22A r 4.

Since the sums due have specifically been claimed in encl 158, I shall make the following awards having considered the sums asked for:

The first plaintiff:

(i) GBP43,938.84 (already settled by the defendant)

(ii) GBP19,620 (already settled by the defendant)

(iii) GBP6,400 (allowed)

(iv) GBP205 (allowed)

(v) In respect of food, lodging and transportation claimed at GBP1,500 per month for 12 months, I allowed a sum of GBP750 for 12 months amounting to GBP9,000

(vi) In respect of the claim of GBP500 for books and stationeries, I awarded a sum of GBP500.

Out of all these sums, a sum of GBP10,000 already paid by the defendant should be deducted.

Hearing of the second plaintiff's claim was adjourned to another date.

Application granted.

Reported by Wong Siok Chin